FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1947.

NO. 261

SAMUEL EUGENE BRAMER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SAMUEL KAUFMAN,
522 Oliver Building,
Pittsburgh, Pennsylvania.

FRANK R. S. KAPLAN,
MAURICE J. MAHONEY,
Frick Building,
Pittsburgh, Pennsylvania,

Counsel for Petitioner.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

INDEX.

	PAGE
Jurisdiction	1
Opinions Below	1
Questions Presented	2
Statutes	2, 11
Statement	2
Specification of Errors	5
Reasons for Allowance of the Writ	6
As to the deduction of the cash payment	6
As to the application of the "Dobson" rule	8
Conclusion	9
Appendix	11

CITATIONS.

Cases:	PAGE
Barber v. Commissioner, Memo T.C., CCH Dec. 14,366 (M), TCM 104	6
Burke v. U.S., D.C.N.Y., not officially reported, 34 AFTR 1614	6
Dexter v. Commissioner 99 F (2d) 769	6
Dobson v. Commissioner, 320 U.S. 489	2, 5, 8
Eckert v. Burnet, 283 U.S. 140	2, 5, 6, 7, 8, 9
Gross v. Commissioner, 36 BTA 759	6
Heininger, Commissioner v., 320 U.S. 467	8, 9
Hawke v. Commissioner, 35 BTA 784	6
Hill, Dean v. Commissioner, Memo BTA, CCH Dec. 12,050 A	6

Cases: PAGE

Jenkins v. Bitgood, 101 F (2d) 17 ..... 6, 7, 8, 9

Larkin v. Commissioner, 46 BTA 213 ..... 7, 8

Menihan v. Commissioner, 79 F (2d) 304 6

Price, Helvering v., 309 U.S. 409 ..... 2, 5, 6, 7, 8, 9

Quinn v. Commissioner, 111 F (2d) 372 6

Rhode Island Hospital Trust Co., Page v., 88 F (2d) 192 ..... 2, 5, 6, 7, 8, 9

Security Flour Mills Co. v. Commissioner, 321 U.S. 281 ..... 8, 9

Tams v. U.S. 33 F. Supp. 764 6

Wilson v. Commissioner, Memo T.C., CCH Dec. 15,284 (M) (Issue 5), 5 TCM 592, 598 6

Rulings:

I.T. 1167, C.B. June, 1922 p. 149 6

I.T. 3252, C.B. June, 1939 p. 182 6

I.T. 3479, C.B. June, 1941 p. 212 6

Supreme Court of the United States

OCTOBER TERM, 1947.

NO. .....

SAMUEL EUGENE BRAMER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

This petition is filed under Section 240 (a) of the Judicial Code, as amended, for review on writ of certiorari of the decision of the United States Circuit Court of Appeals for the Third Circuit entered May 12, 1947, (R 31) rehearing denied, July 5, 1947. (R 51)

Opinions Below.

The opinion of the Tax Court (R 3 a) is reported in 6 TC 1027, and the opinion of the Circuit Court of Appeals (R 30) is reported in 161 F (2d) 185.

Questions Presented.

1. Whether the rule of *Eckert v. Burnet,* 283 U.S. 140, *Helvering v. Price,* 309 U.S. 409, *Page v. Rhode Island Hospital Trust Co.,* 88 F (2d) 192, and similar decisions, under which losses sustained by cash basis taxpayers may not be deducted until payment in cash, applies to losses sustained by an insolvent individual on sales of stock by a bank which held the stock as security for notes given by the insolvent to the bank to cover the purchase price of the stock.

2. Whether *Dobson v. Commissioner,* 320 U.S. 489, and the later simliar decisions of the Supreme Court require affirmance of a decision of the Tax Court denying deduction under Section 23(e) of the Internal Revenue Code of a payment by a cash basis taxpayer on a note given to cover a loss sustained in a stock transaction entered into for profit.

Statutes.

The pertinent statutes are printed in the Appendix, *infra,* p. 11.

Statement.

The question before the Tax Court was whether the respondent erred in disallowing, as a deduction from 1941 income, a cash payment made by petitioner in 1941 on a note given to W. K. Frank in 1935 as the result of a transaction begun in 1929.

The facts were in large part stipulated and the stipulation was adopted by the Tax Court. (R 4 a) The essential Findings of Fact of the Tax Court are summarized as follows:

In the summer of 1929, The Bank of Pittsburgh, N.A., gave petitioner an oral option to buy 18,800 shares of stock of International Rustless Iron Corporation at $3.00 per share. At the same time the bank gave L. B. Foster and William K. Frank like options to buy 10,500 shares and 12,500 shares, respectively. (R 5 a)

Petitioner was without sufficient funds or collateral of his own to finance the purchase of the 18,800 shares which had been allotted to him. He pooled his allotment with those of Foster and Frank in a syndicate after they had assured him that they would finance and handle the syndicate without any contribution of cash or securities by him. (R 5 a-6 a)

Pursuant to the syndicate agreement (R 6 a), 60,000 shares of Rustless stock (including the 41,800 shares allotted by the Bank) were bought for the syndicate for $236,752.50, Frank and Foster negotiated a loan from The Bank of Pittsburgh, N.A. for the full purchase price of $236,725.50, one note signed by petitioner, Foster and Frank, was given to the bank to evidence that loan, and the bank held as collateral on the loan all the 60,000 shares of Rustless stock bought and certain shares of Weirton Steel Company (later National Steel Corporation) deposited by Foster and Frank. (R 7 a)

In 1930 some of the purchased Rustless shares were sold (at a loss) by the bank on instructions of petitioner's associates and the proceeds were applied by the bank in reduction of the syndicate note. Petitioner claimed on his 1930 return one-third the loss on the 1930 sales. (R 7 a)

In January, 1931, petitioner's associates arranged with the bank for a split-up of the syndicate note, petitioner gave the bank his individual note for $66,647.64, one-third of the syndicate debt, and the bank continued

to hold as collateral to this note one-third of the syndicate's remaining Rustless shares and all of the shares of National Steel which had been deposited by W. K. Frank, one of the associates, as collateral to the syndicate note. (R 7 a-8 a)

The situation continued without change until 1935. In that year, on orders from Frank without consulting petitioner, the bank sold the Rustless shares (for less than $1,000) and enough of Frank's National Steel shares to pay petitioner's note of $66,647.64 and petitioner gave Frank a note for the full amount of the proceeds of Frank's shares applied by the bank on petitioner's note. Petitioner did not claim on his 1935 return any loss on the Rustless stock but respondent listed the loss in computing a 1935 capital loss of $2,000. (R 9 a-10 a)

From the inception of the transaction to August, 1935, no payment of any kind was made by the petitioner or by anyone on his behalf other than the credits (on the note held by the Bank) out of the proceeds of the Rustless and National Steel shares held as collateral and sold by the Bank. (R 9 a)

For a number of years the petitioner owed debts which far exceeded his assets. His financial condition gradually improved (R 12 a) and from 1939 to 1943 petitioner paid Frank in full the principal of and interest on the note given by petitioner to Frank in 1935. (Stipulation par. 25) The petitioner always filed his income tax returns on a cash basis. (R 12 a)

In 1941 the petitioner paid $13,492.70 on the principal of the note given by him to Frank in 1935. Petitioner deducted this payment as a loss and the respondent disallowed the deduction. (R 10 a) The Tax Court sustained so much of the disallowance as pertained to

the loss on the syndicate Rustless shares on the grounds that petitioner sustained deductible losses when the Rustless shares were sold by the bank in 1930 and 1935. (R 14 a) The Circuit Court of Appeals affirmed the Tax Court upon the basis of *Dobson v. Commissioner,* 320 U.S. 489, and the later similar decisions of the Supreme Court. (R 30)

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the decision of the Tax Court must be affirmed, basing its conclusion "upon *Dobson v. Commissioner,* 320 U.S. 489, and the later similar decisions of the Supreme Court."

2. In affirming the decision of the Tax Court.

The Tax Court, and the Circuit Court of Appeals in affirming the Tax Court, erred:

3. In holding, contrary to Section 43 of the Internal Revenue Code, contrary to the decisions of this Court in *Eckert v. Burnet,* 283 U.S. 140 and *Helvering v. Price,* 309 U.S. 409, and contrary to the decision of the Circuit Court of Appeals for the First Circuit in *Page v. Rhode Island Hospital Trust Co.,* 88 F (2d) 192, that the petitioner, an insolvent cash basis taxpayer, sustained deductible losses on sales of shares of Rustless stock in 1930 and 1935, before he made any payment on account of the purchase price, and that the petitioner is not entitled to deduct from his gross income of 1941 the cash payment which he made in 1941 on account of the note given in 1935 to cover the loss.

Reasons for Allowance of the Writ.

AS TO THE DEDUCTION OF THE CASH PAYMENT.

The decision of the Tax Court, affirmed by the Court below, is in conflict with the decisions of this Court in *Eckert v. Burnet,* 283 U.S. 140, and *Helvering v. Price,* 309 U.S. 409. It is also in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Page v. Rhode Island Hospital Trust Company,* 88 F (2d) 192, and with the decision of the Circuit Court of Appeals for the Second Circuit in *Jenkins v. Bitgood,* 101 F (2d) 17.

In *Eckert v. Burnet,* 283 U.S. 140, and *Helvering v. Price,* 309 U.S. 409, this Court held that a cash basis taxpayer may not deduct a loss in the year in which he gives his note to cover the loss but that deduction of the loss must be postponed until the year (or years) in which he pays cash. The doctrine of these decisions has been applied in various circumstances in later decisions of Circuit Courts of Appeals, District Courts and the Tax Court.[1] It has been applied by the Bureau of Revenue in published rulings.[2]

---

1. See e.g., *Menihan v. Commissioner,* 79 F (2d) 304; *Page v. Rhode Island Hospital Trust Co.,* 88 F (2d) 192; *Dexter v. Commissioner,* 99 F (2d) 769; *Jenkins v. Bitgood,* 101 F (2d) 17; *Quinn v. Commissioner,* 111 F (2d) 372; *Burke v. U.S.,* D.C. N.Y., not officially reported, 34 AFTR 1614; *Tams v. U.S.,* 33 F Supp, 764; *E. R. Hawke v. Commissioner,* 35 BTA 784; *Max Gross v. Commissioner,* 36 BTA 759; *Dean Hill v. Commissioner,* Memo BTA, CCH Dec. 12,050 A; *Barber v. Commissioner,* Memo T.C., CCH Dec. 14,366 (M), 4 TCM 104; *W. H. Wilson v. Commissioner,* Memo T.C., CCH Dec. 15,284 (M) (Issue 5), 5 TCM 592, 598.

2. I.T. 1167, C.B. June, 1922, p. 149; I.T. 3252, C.B. June, 1939 p. 182; I.T. 3479, C.B. June, 1941 p. 212.

In *Page v. Rhode Island Hospital Trust Co.*, 88 F (2d) 192, the doctrine of the *Eckert* and *Price* cases was applied to allow a cash basis taxpayer to deduct his losses on sales of stocks carried in a "grossly undermargined" brokerage account in the year of payment of notes given to the broker rather than in the prior years when the stocks were sold at losses; notwithstanding that the losses had been deducted in the prior years when the loss sales had been made. In *Jenkins v. Bitgood*, 101 F (2d) 17, the Court disallowed deduction of a loss on a stock transaction in the year of worthlessness and held that deduction must be postponed until cash payment of the note given to cover the loss.

The decision of the Tax Court in the present case is grounded on its decision in *J. J. Larkin v. Commissioner*, 46 BTA 213. There the Tax Court refused to apply the doctrine of the *Eckert, Price* and *Rhode Island Hospital Trust Company cases* to a loss in a stock transaction and denied the deduction in the year of payment of a note given to a bank for the purchase price of the stock. It grounded its decision on its finding that the taxpayer (Larkin) had purchased stock from the owners and not from the creditor bank which was holding the stock as security for the notes of the prior owners. The Tax Court concluded in the *Larkin* case that the transaction was a new borrowing by Larkin by the giving of a new note in payment of the debt of the former owners. There was thus an effort in the *Larkin* decision to justify departure from the rule of *Eckert v. Burnet*, 283 U.S. 140, *Helvering v. Price*, 309 U.S. 409 and *Page v. Rhode Island Hospital Trust Co.*, 88 F (2d) 192. There is no such effort in the present case and the Tax Court does not even comment on the reasons for departure from the

rule. It simply states that the facts are "much the same" as in *Larkin.*

In refusing to apply the doctrine of the *Eckert, Price,* and *Rhode Island Hospital Trust Co.* cases in this case and in *Larkin* the Tax Court is charting a course contrary to the authorities. Its reliance in this case on its conclusion that the petitioner was an owner of the Rustless stock when it was sold at a loss (R 14 a) is misplaced. The doctrine of the *Eckert, Price* and *Rhode Island Hospital Trust Co.* cases rests on the proposition that the statutory provisions (Sections 23 (e) and 43), as a pure matter of law, preclude deduction of a loss before payment in cash by a cash basis taxpayer. Even if the decision in *Larkin* is right, the conclusion reached by the Tax Court in the present case is precluded by its findings that petitioner had not paid any cash at the times of the sales of the Rustless stock (R 9 a), and that petitioner was insolvent (R 12 a).

The doctrine relied on by the petitioner was applied by the Tax Court, in the present case, to another transaction in Rustless stock. (R 16 a-17 a) Its refusal to apply the same rule to the syndicate transaction is grounded on its misplaced conception of the effect of ownership of the stocks. Similar ownership was present in the *Rhode Island Hospital Trust Co.* and *Jenkins* cases.

AS TO THE APPLICATION OF THE "DOBSON" RULE.

Refusal of the Court below to review the decision of the Tax Court is in conflict with the decision of this Court in *Helvering v. Price,* 309 U.S. 409. It is an improper application of the doctrine of *Dobson v. Commissioner,* 320 U.S. 489, and in conflict with the decisions of this Court in *Commissioner v. Heininger,* 320 U.S. 467, and *Security Flour Mills Co. v. Commissioner,* 321 U.S. 281.

In *Helvering v. Price,* 309 U.S. 409, this Court held that the legal effect of a transaction in the application of Section 23 (e) of the Revenue Act, as to the deduction of losses sustained during the taxable year, was reviewable by the Circuit Court of Appeals. In *Commissioner v. Heininger,* 320 U.S. 467, this Court affirmed the Circuit Court of Appeals' reversal of the decision of the Tax Court on the question whether certain legal expenses were deductible under Section 23 (a). This Court also affirmed the Circuit Court of Appeals' reversal of the decision of the Tax Court in *Security Flour Mills Co. v. Commissioner,* 321 U.S. 281, where, as in this case, the question was the time for deduction, under Section 43 of the Internal Revenue law, of an admittedly deductible item. These and other "later similar decisions of the Supreme Court" require review to determine whether the Tax Court decision is precluded by the statute (here sections 23 (e) and 43).

Conclusion.

The tax question in this case is one of great importance. It involves application of fundamental principles with respect to cash basis taxpayers heretofore regarded as settled under the doctrine of *Eckert, Price, Rhode Island Hospital Trust Co.* and *Jenkins* cases. It is of interest to almost every individual who risks, in a business transaction, loss of more than he possesses, since individuals generally make their returns on the cash basis. It is a matter of considerable importance that the tax status of cash payments by individuals on debts resulting from loss transactions be settled, particularly in view of the foregoing conflict.

Another important question is whether the "Dobson" rule should be so applied as to preclude review, and correction or clarification, of a principle of such great importance to so many taxpayers.

The great importance to so many taxpayers of these questions and the existing conflicts call for their review and resolution by this Court.

Respectfully submitted,

SAMUEL KAUFMAN,
522 Oliver Building,
Pittsburgh, Pennsylvania.

FRANK R. S. KAPLAN,
MAURICE J. MAHONEY,
Frick Building,
Pittsburgh, Pennsylvania,

Counsel for Petitioner.

APPENDIX.

INTERNAL REVENUE TITLE

(Internal Revenue Code)

Subtitle A—Chapter I—Income Tax

Subchapter B—General Provisions

Part II. Computation of Net Income.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * *

(e) Losses by Individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

Part IV. Accounting Periods and Methods of Accounting.

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions * * * provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *